THE INCOME TAX APPELLATE TRIBUNAL,
MUMBAI BENCH "B", MUMBAI

BEFORE SHRI KULDIP SINGH, JUDICIAL MEMBER
AND
SHRI GAGAN GOYAL, ACCOUNTANT MEMBER

ITA Nos.897, 898 & 899/M/2023
Assessment Years: 2016-17, 2017-18 & 2018-19

Dy. Commissioner of Income Tax , Central Circle-1(2), 906, 9th Floor, Pratishtha Bhawan, Old CGO Bldg. (Annexe), M.K. Road, Mumbai – 400 020	Vs.	M/s. Bhupati Infrabuild Services Pvt. Ltd., Office No.320, 3rd Floor, Orion Business Park, Near Cine Wonder, Near Tatvadnyan, Thane, Maharashtra – 400 607 **PAN: AAECB1522F**
(Appellant)		(Respondent)

Present for:
Assessee by : Shri Viraj Mehta, A.R.
Revenue by : Shri S. Srinivasu, D.R.

Date of Hearing : 19 . 07 . 2023
Date of Pronouncement : 27 . 07 . 2023

O R D E R

Per Bench:

Since common question of law and facts have been raised in these inter-connected appeals, the same are being disposed of by way of composite order to avoid repetition of discussion.

2. The Revenue by filing the present appeals, sought to set aside the impugned composite order dated 03.01.2023 passed by the Commissioner of Income Tax (Appeals), Mumbai [hereinafter referred to as CIT(A)] qua the assessment years 2016-17, 2017-18

& 2018-19 on identically worded grounds (grounds of ITA No.897/M/2023 for A.Y. 2016-17 are taken for the sake of brevity) inter-alia that :-

> *"1. In the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not appreciating the fact that there is nothing in the language of the provisions which would indicate that the assessment is restricted to incriminating material or the basis of the assessment would be that which is discovered during the search or during the process contemplated by Section 132A of the Income Tax Act, 1961 and that this view finds full support from the judgement of the Hon'ble Delhi High Court in the case of CIT Vs. Anil Kumar Bhatia, 352 ITR 493 (Del) and the judgement of the Karnataka High Court in the case of Canara Housing Development Company Vs. DCIT, 274 CTR 122 (Kar).*
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> *2. In the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in placing reliance on various judicial pronouncements including in the cases of CIT Vs. Continental Warehousing Corporation, All Cargo Global Logistics Vs. DCIT, etc., without appreciating that these judgements have not been accepted by the Department and in fact, SLP filed by the Department against Bombay High Court's order in the case of Continental Warehousing Corporation (Nhava Sheva) Ltd., has been admitted by the Hon'ble Apex Court [vide order dated 12.10.2015 in Special Leave to Appeal (C) CC 18506/2015] and is pending for adjudication.*
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> *3. In the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in not deciding the grounds of appeal raised by the assessee on the merits of the case but has merely held that the additions made by the AO in the assessment order framed u/s 153C r.w.s 143(3) of the Act cannot survive de hors the incriminating evidences.*
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> *4. In the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in directing the A.O. delete the to disallowance made on account of salary paid by the assessee in cash without considering the fact that the assessee had failed to substantiate with documentary evidences that the work had been carried by it for Capacit'E Infraprojects Ltd. towards which the payments were made in cash.*
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> *5. In the facts and in the circumstances of the case and in law, the Ld. CIT(A) has erred in directing the A.O. to delete the disallowance made on account of employee's contribution to welfare funds beyond the due date without considering the fact that the Apex Court in the latest judgement in the case of Checkmate Services (P.) Ltd. Vs CIT [2022] 143 taxmann.com 178 (SC) has decided this issue in favour of the Revenue."*

3. Briefly stated facts necessary for consideration and adjudication of the issues at hand are : the assessee company being a domestic company filed its return of income declaring total income of Rs.54,15,610/- each for A.Y. 2016-17, 2017-18 & 2018-19. On the basis of survey action carried out on the assessee on 20.08.2019 the assessee again filed the return of income under section 153C of the Income Tax Act, 1961 (for short 'the Act') declaring same income of Rs.54,15,610/- for A.Y. 2016-17, 2017-18 & 2018-19. Declining the contentions raised by the assessee the Assessing Officer (AO) proceeded to frame the assessment at the total income of Rs.1,70,11,570/- by making addition and disallowance to the tune of Rs.1,15,95,962/- each for A.Y. 2016-17, 2017-18 & 2018-19 under section 153C of the Act.

4. The assessee carried the matter before the Ld. CIT(A) by way of filing appeal who has deleted the additions by partly allowing the appeal filed by the assessee. Feeling aggrieved with the impugned order passed by the Ld. CIT(A) the Revenue has come up before the Tribunal by way of filing present appeals.

5. I have heard the Ld. Authorised Representatives of the parties to the appeal, perused the orders passed by the Ld. Lower Revenue Authorities and documents available on record in the light of the facts and circumstances of the case and law applicable thereto.

Ground Nos.1, 2, 3 & 4 of A.Y. 2016-17, 2017-18 & 2018-19

6. Bare perusal of the grounds raised by the Revenue and impugned order passed by the Ld. CIT(A), which is under

challenge before the Tribunal, it is undisputed fact on record that the addition made by the AO under section 153C read with section 143(3) of the Act has been deleted by the Ld. CIT(A) on the basis of settled principle of law that addition made dehors the "incriminating material" made by the AO is not sustainable in view of the decision rendered by Special Bench of the Tribunal in case of CIT vs. Alcargo Global Logistic Ltd. Alcargo Global Logistics Ltd. vs. DCIT 2012-TIOL-391-ITAT-MUM-SB, decision rendered Hon'ble Bombay High Court CIT vs. Continental Warehousing Corporation (Nhava Sheva) Ltd. and Anr. reported in 374 ITR 645 by returning following findings:

> *"7.14 Conclusion: The aforesaid detailed discussion with respect to various judicial decisions clearly laid down the following principles-*
>
> *(1) the assessments which have been concluded u/s 1433) of the Act and not pending at the time of search proceedings, do not abate.*
>
> *(ii) for this purpose, intimation u/s 1431) would constiture an assessment, relying on the decision of Hon'ble Bombay High Court in CIT V/S Gurinder Singh Bawa (79 taxmann.com 398).*
>
> *(iii) the proceedings u/s 153A/153C of the Act do not empower the Assessing officer to re-adjudicate the settled issues again, unless fresh incriminating material is found during the course of search proceedings.*
>
> *(iv) the Assessing officer does not have jurisdiction to make additions/disallowances which are not based on any incriminating material found during the course of search proceedings.*
>
> *(v) in the case of completed/un abetted assessments, where no incriminating material is found during the course of search, the assessment u/s 153A/153C of the Act is to be made on originally assessed/returned income and no addition or disallowance can be made de hors the incriminating evidences recovered during the course of search.*
>
> *(vi) Any admission or confession needs corroboration with evidences. In order to make a genuine and legally sustainable addition on the basis of admission or confession during search action, it is necessary that some incriminating material must have been found to correlate the undisclosed income with such statement.*

(vi) Any statement recorded under section 132(4) cannot be considered as incriminating material found in the course of search as these are recorded to chicit more information/explanation of the search person on the incriminating documents/gold/jewellery found during search.

7.15 Conclusion As stated above, the AO has not brought on record either through the assessment order or through remand report any incrimmating document or material found or seized during the Search and Seizure action u/s 132 of the Act in the group cases which can be connected with these additions. Considering the totality of the facts and circumstances, I am of the considered view that these additions cannot survive de hors the incriminating evidences as held in the above binding judicial decisions. The AO is accordingly directed to delete the impugned additions made in the assessment order. Thus, the additional ground of appeal no. 5 is allowed."

7. Ld. D.R. for the Revenue challenging the impugned order passed by the Ld. CIT(A) relied upon the order passed by the AO to delete the addition and contended that the decision rendered by Hon'ble Bombay High Court in case of CIT vs. Continental Warehousing Corporation (supra) has already been challenged before the Hon'ble Supreme Court by way of special leave petition which has been admitted and pending for filing adjudication. Apart from this argument the Ld. D.R. has not taken the Bench to the "incriminating material", if any, found during the survey proceedings on the basis of which addition can be made. Merely because of the fact that SLP filed by the Revenue is pending before the Hon'ble Supreme Court, relief otherwise available to the assessee in view of the law laid down by the Hon'ble Jurisdictional Bombay High Court cannot be withheld.

8. So keeping in view the decision rendered by Hon'ble Bombay High Court in case of M/s. Continental Warehousing Corporation (supra), Special Bench of the Tribunal in case of All Cargo Global Logistics Ltd. (supra) and the decision rendered by the Hon'ble Delhi High Court in case of Kabul Chawla (supra) and

the decision rendered by the Hon'ble Supreme High Court Meeta Gutgutia (supra). When admittedly no "incriminating material" has been found on the basis of search carried out on the premises of the assessee, rather the AO has made the addition merely on the basis of surmises which is not sustainable in the eyes of law. In view of the matter we find no ground to interfere into the impugned findings returned by the Ld. CIT(A). So Ground Nos.1, 2, 3 & 4 of A.Y. 2016-17, 2017-18 & 2018-19 raised by the Revenue are dismissed.

Ground No.5 of A.Y. 2016-17, 2017-18 & 2018-19

9. The AO disallowed the deduction claimed by the assessee to the tune of Rs.45,66,608/- and Rs.1,43,210/- on account of Provident Fund (PF) & Employees' State Insurance Corporation (ESIC) respectively under section 36(1)(va) read with section 2(24)(x) of the act on the ground that the assessee has failed to deposit the employees' contribution of PF & ESIC within the due date prescribed under the Act.

10. The Ld. CIT(A) deleted the disallowance made by the ATO which is under challenge before the Tribunal.

11. By now it is settled principle of law as laid down by the Hon'ble Supreme Court in case of Checkmate Services P. Ltd. vs. CIT order dated 12.10.2022 that payment made by the employer's qua employees' contribution on account of PF & ESIC after due date prescribed under the relevant Act is not allowable deduction under section 36(1)(va) read with section 43B of the Act, the operative findings of the Hon'ble Supreme Court are as under:

> *"51. The analysis of the various judgments cited on behalf of the assessee i.e., Commissioner of Income-Tax v. Aimil Ltd.; Commissioner of Income-Tax and another v. Sabari Enterprises; Commissioner of*

Income Tax v. Pamwi Tissues Ltd.; Commissioner of Income-Tax, Udaipur v. Udaipur Dugdh Utpadak Sahakari Sandh Ltd. and Nipso Polyfabriks (supra) would reveal that in all these cases, the High Courts principally relied upon omission of second proviso to Section 43B (b). No doubt, many of these decisions also dealt with Section 36(va) with its explanation. However, the primary consideration in all the judgments, cited by the assessee, was that they adopted the approach indicated in the ruling in Alom Extrusions. As noticed previously, Alom Extrutions did not consider the fact of the introduction of Section 2(24)(x) or in fact the other provisions of the Act.

52. When Parliament introduced Section 43B, what was on the statute book, was only employer's contribution (Section 34(1)(iv)). At that point in time, there was no question of employee's contribution being considered as part of the employer's earning. On the application of the original principles of law it could have been treated only as receipts not amounting to income. When Parliament introduced the amendments in 1988-89, inserting Section 36(1)(va) and simultaneously inserting the second proviso of Section 43B, its intention was not to treat the disparate nature of the amounts, similarly. As discussed previously, the memorandum introducing the Finance Bill clearly stated that the provisions –especially second proviso to Section 43B - was introduced to ensure timely payments were made by the employer to the concerned fund (EPF, ESI, etc.) and avoid the mischief of employers retaining amounts for long periods. That Parliament intended to retain the separate character of these two amounts, is evident from the use of different language. Section 2(24)(x) too, deems amount received from the employees (whether the amount is received from the employee or by way of deduction authorized by the statute) as income - it is the character of the amount that is important, i.e., not income earned. Thus, amounts retained by the employer from out of the employee's income by way of deduction etc. were treated as income in the hands of the employer. The significance of this provision is that on the one hand it brought into the fold of "income" amounts that were receipts or deductions from employees income; at the time, payment within the prescribed time – by way of contribution of the employees' share to their credit with the relevant fund is to be treated as deduction (Section 36(1)(va)). The other important feature is that this distinction between the employers' contribution (Section 36(1)(iv)) and employees' contribution required to be deposited by the employer (Section 36(1)(va)) was maintained - and continues to be maintained. On the other hand, Section 43B covers all deductions that are permissible as expenditures, or out-goings forming part of the assessees' liability. These include liabilities such as tax liability, cess duties etc. or interest liability having regard to the terms of the contract. Thus, timely payment of these alone entitle an assessee to the benefit of deduction from the total income. The essential objective of Section 43B is to ensure that if assessees are following the mercantile method of accounting, nevertheless, the deduction of such liabilities, based only

on book entries, would not be given. To pass muster, actual payments were a necessary pre-condition for allowing the expenditure.

53. The distinction between an employer's contribution which is its primary liability under law – in terms of Section 36(1)(iv), and its liability to deposit amounts received by it or deducted by it (Section 36(1)(va)) is, thus crucial. The former forms part of the employers' income, and the later retains its character as an income (albeit deemed), by virtue of Section 2(24)(x) - unless the conditions spelt by Explanation to Section 36(1)(va) are satisfied i.e., depositing such amount received or deducted from the employee on or before the due date. In other words, there is a marked distinction between the nature and character of the two amounts – the employer's liability is to be paid out of its income whereas the second is deemed an income, by definition, since it is the deduction from the employees' income and held in trust by the employer. This marked distinction has to be borne while interpreting the obligation of every assessee under Section 43B.

54. In the opinion of this Court, the reasoning in the impugned judgment that the non-obstante clause would not in any manner dilute or override the employer's obligation to deposit the amounts retained by it or deducted by it from the employee's income, unless the condition that it is deposited on or before the due date, is correct and justified. The non-obstante clause has to be understood in the context of the entire provision of Section 43B which is to ensure timely payment before the returns are filed, of certain liabilities which are to be borne by the assessee in the form of tax, interest payment and other statutory liability. In the case of these liabilities, what constitutes the due date is defined by the statute. Nevertheless, the assessees are given some leeway in that as long as deposits are made beyond the due date, but before the date of filing the return, the deduction is allowed. That, however, cannot apply in the case of amounts which are held in trust, as it is in the case of employees' contributions- which are deducted from their income. They are not part of the assessee employer's income, nor are they heads of deduction per se in the form of statutory pay out. They are others' income, monies, only deemed to be income, with the object of ensuring that they are paid within the due date specified in the particular law. They have to be deposited in terms of such welfare enactments. It is upon deposit, in terms of those enactments and on or before the due dates mandated by such concerned law, that the amount which is otherwise retained, and deemed an income, is treated as a deduction. Thus, it is an essential condition for the deduction that such amounts are deposited on or before the due date. If such interpretation were to be adopted, the non-obstante clause under Section 43B or anything contained in that provision would not absolve the assessee from its liability to deposit the employee's contribution on or before the due date as a condition for deduction.

> *55. In the light of the above reasoning, this court is of the opinion that there is no infirmity in the approach of the impugned judgment. The decisions of the other High Courts, holding to the contrary, do not lay down the correct law. For these reasons, this court does not find any reason to interfere with the impugned judgment. The appeals are accordingly dismissed."*

12. We are of the considered view that when the issue in question has been settled by the Hon'ble Supreme Court of India in case of Checkmate Services Pvt. Ltd. (supra) once for all the case law relied upon by the assessee is not applicable to the facts and circumstances of the case. Moreover, when the assessee has apparently made incorrect claim in its return of income which is against the provisions contained under PF & ESIC as to depositing the employees' contribution on account of PF & ESIC within a particular time frame, any deposit thereafter would not be entitled for deductions as has been held by the Hon'ble Supreme Court.

13. In view of the matter, we are of the considered view that the Ld. CIT(A) has erred in deleting the disallowance made by the AO under section 36(1)(va) of the Act which is set aside and order passed by the AO is restored. So ground No.5 for A.Y. 2016-17 raised by the Revenue is allowed.

14. In view of what has been discussed above the appeal filed by the Revenue for A.Y. 2016-17 is partly allowed and appeals filed by the Revenue for A.Y. 2017-18 & 2018-19 are dismissed.

Order pronounced in the open court on 27.07.2023.

Sd/-	**Sd/-**
(GAGAN GOYAL)	**(KULDIP SINGH)**
ACCOUNTANT MEMBER	**JUDICIAL MEMBER**

Mumbai, Dated: 27.07.2023.

* Kishore, Sr. P.S.

Copy to: The Appellant
The Respondent
The CIT, Concerned, Mumbai
The CIT (A) Concerned, Mumbai
The DR Concerned Bench

//True Copy//

By Order

Dy/Asstt. Registrar, ITAT, Mumbai.